

Before the
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

In the Matter of:

Expedited Consideration for Declaratory Rulings)	
On the transfer of traffic only under AT&T)	
Tariff Section 2.1.8., and Related Issues.)	
)	
Primary Jurisdiction Referral)	
from the NJ District Court)	
)	CCB/CPD 96-20
)	DA – 06-2360
)	WC Docket No. 06-210
One Stop Financial, Inc)	
Group Discounts, Inc.)	
Winback & Conserve Program, Inc.)	
800 Discounts, Inc.)	
Petitioners)	
)	
and)	
AT&T Corp.)	
Respondent)	

FURTHER COMMENTS OF PETITIONERS
REGARDING RECONSIDERATION AND CLARIFICATION OF
FCC OCT 12th 2007 ORDER

To FCC:
Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary

Ms. Deena Shetler
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Representing: One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc.
and

Winback & Conserve Program, Inc (The Inga Companies)

Its president

Al Inga

Feb 26th 2007

1) Petitioners will respond to AT&T's nonsense chronologically in AT&T's brief:

AT&T's February 20th 2007 comments at page 1 para 2:

The first issue is whether, under the terms of the tariff, CCI's 800 service plans were completely immune from shortfall liability because they were "pre-June 1994" plans. This grandfathering" issue raises a question of tariff interpretation that is arguably encompassed by the original referral, because petitioners mistakenly claim that CCI's plans enjoyed an immunity under AT&T's tariff from shortfall liabilities that excused PSE's refusal to accept the obligation to pay shortfall charges under 2.1.8. [footnote1] This "grandfathering" issue was therefore briefed before the Commission in the original referral proceedings, it was briefly discussed at oral argument before the DC Circuit and the parties have briefed it again now.

FOOTNOTE 1: As AT&T explained in its Opening Comments, at 17 n.9, PSE still violated Section 2.1.8 because it refused to accept any of CCI's obligations, including those explicitly enumerated in section 2.1.8.

2) Petitioners never took the position that because the plans were immune from shortfall and termination (S&T) obligations that this affected which obligations transfer on "traffic only" transfers. AT&T of course shows no quotes of petitioners making taking such a position. The undisputed fact that the plans were all immune from S&T obligations was argued on two fronts:

3) To counter AT&T's bogus allegations that CCI's plans would certainly go into shortfall due to the fact that the S&T obligations (which stay on the CCI/Inga plans) could not possibly be met with little traffic remaining on the plans. The undisputed S&T immunity of the plans countered AT&T's fraudulent use allegations in reference to the traffic only transfer. Petitioner's clearly made it known that the S&T immunity countered AT&T's Fraudulent Use claims. See petitioners 1/12/07

FCC filing Exhibit E page 51 footnote 25 in which it first quotes the District Court Decision then explains it counters AT&T's Fraudulent Use claims:

“Suffice it to say that, with regard to pre June, 1994 plans, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff.” Id. Obviously, the 6/17/94 Ruling was 6 months before the January 1995 traffic only transfer so AT&T knew plaintiffs were immune from S&T charges long before the traffic only transfer. AT&T's Fraudulent Use claims were completely fabricated.”

4) Petitioners agree with AT&T that whether the plans were grandfathered or not has no bearing on which obligations transfer on traffic only transfers. There is no relationship between the June 17th 1994 grandfather provision and section 2.1.8. Although there is no tariffed relationship, there is a question of propriety. AT&T has bogusly asserted that S&T obligations transfer on traffic only transfers. Therefore, even though there is no tariffed relationship between the June 17th 1994 grandfather provision and section 2.1.8; the propriety of demanding S&T obligations that couldn't be charged due to grandfathered immunity was a propriety issue which would be a violation of 201(b) as it would be “unjust and unreasonable” if S&T obligations really did transfer on traffic only transfers, which they do not.

5) AT&T's master con here is to attribute a position to petitioners that it never made. Petitioners never stated that PSE was supposed to assume S&T obligations under 2.1.8. Petitioners have always maintained that S&T obligations do not transfer on traffic only transfers. AT&T then takes the con further by asserting that petitioners then “supported the position that it never made” with its argument that its plans were immune from S&T obligations---- so PSE did not have to assume the S&T obligations!!! The AT&T ruse is to attribute the undisputed fact that the

plans were immune from S&T obligations to which obligations transfer on a traffic only transfer. There is no correlation. The S&T immunity only counters AT&T's fraudulent use assertion where AT&T took the position that S&T obligations did not transfer on traffic only transfers. S&T obligations do not transfer on traffic only transfers no matter whether the plans are grandfathered or not.

6) AT&T also asserts that the argument over the pre June 17th 1994 plans had only to do with the traffic only transfer issue. This is also false. The FCC asked for supplemental briefs having to do with the June 1996 S&T infliction. AT&T creates a bogus position that the pre June 1994 grandfathering issue only was in relation to the traffic transfer issue.

7) As petitioners detailed on page 20 para 48 of its Jan. 31st 2007 comments the FCC Decision clearly states that both parties addressed the June 1996 shortfall infliction issue in separate filings with the FCC that were added to the Declaratory Ruling proceedings dealing with the traffic only transfer. The FCC's 2003 Decision clearly shows that the dates of the FCC filings by AT&T and petitioners are **August 26, 1996**, and **September 23, 1996**; obviously after the **June 1996** shortfall infliction.

See the FCC says the shortfall infliction was a separate issue...

FCC 2003 Decision Page 4 para 7

On July 15, 1996, the aggregators filed a petition with the Commission in which, "based on established Commission practice, policies, and precedents, the plain language of § 203 of the Communications Act of 1934, as amended, F.C.C. Rule 61.54(j), and Sections 201 and 202 of the Act," they sought declaratory rulings on four issues. **By separate cover motion**, the aggregators **also sought expedited consideration** of their petition for declaratory ruling because, they alleged, AT&T was **unlawfully billing certain charges to the aggregators' end-users**. AT&T

filed Comments in Opposition on August 26, 1996, and Petitioners filed Reply Comments on September 23, 1996.

8) AT&T also stated that the shortfall issue was discussed during oral argument and implies that it was discussed in regard to PSE's assumption of S&T obligations. No Way! It was discussed in terms of how CCI/Inga were to meet the commitments on the plans that remained with the actual S&T obligations. AT&T forgets that the DC Circuit had the grandfathering issue fully briefed as Judge Ginsburg completed the FCC's counsel's sentence:

FCC's MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this that the Commission didn't rule on. I mean, for instance --**

JUDGE GINSBURG: Whether they were grandfathered?

MR. BOURNE: Right. So it could well be that there were little or no shortfall charges. The Commission didn't rule on that point, but if there were little or no --

JUDGE GINSBURG: If that was the understanding with which they went into this, then the nature of the scheme was to move the obligation to a customer who, away from a customer who would be able to shed its obligations under the grandfather provision, right? Or pardon me, if the Commission agreed that it was grandfathered under the old tariff. That's the scheme, to move it from somebody who's got the benefit of grandfathering and can get out of its obligation that way to somebody who's got the benefit of a larger discount.

MR. BOURNE: That's correct.

JUDGE GINSBURG: Okay.

MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year**, for instance, and a carrier had already met its minimum usage obligations, then there wouldn't be any issue of -- now, I don't know the answer to that, but there --

JUDGE GINSBURG: Okay, okay.

MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year**, for instance, and a carrier had already met its minimum usage obligations, then there wouldn't be any issue of -- now, I don't know the answer to that, but there --

JUDGE GINSBURG: Okay, okay.

9) The above quote regarding the pre June 17th 1994 grandfathering provision is in relation to one of the ways the CCI/Inga plans could meet its **remaining S&T obligations**. Neither the FCC nor petitioners ever suggested that the undeniable fact that the plans were immune from S&T obligations dictated which obligations transfer under 2.1.8. AT&T's position to the District Court of 6/13/05 at Page 2 para 3 clearly states that the pre June 17th, 1994 grandfather issue was an open issue that was argued in reference to whether shortfall could be applied to the plans, not in terms of whether S&T obligations should transfer on traffic only transfers:

Rather than reinstitute the proceedings at the FCC, the Inga Companies have now asked this Court to resolve the **open issues** and to rule on a series of technical issues of tariff interpretation. Under their view, the Court should now determine such matters as whether the phrase "all obligations" in Section 2.1.8 somehow excludes minimum volume/term commitments; whether these commitments are part of the "minimum payment periods" within the meaning of 2.1.8; whether the plans in question are **"pre1994" plans to which shortfall charges allegedly could not apply**; and what significance was of AT&T's withdrawal of a subsequent tariff transmittal-- and to resolve these tariff issues in a manner consistent with the **nondiscrimination requirements** of 47 U.S. C. Section 202(a) and of the FCC's implementing regulations. **All these issues were previously raised in the FCC and the DC Circuit proceedings, and all these issues can be efficiently decided by the FCC now--under the DC Circuit Decision.**

In light of the DC Circuits decision, it is understandable that the Inga Companies would want to try to shift forums mid-stream and to re-litigate these technical tariff and other issues in a Court outside the DC Circuit. But this forum shopping is not only itself illicit; **it is barred by the terms of this Courts stay, by the Third Circuit's earlier mandate and by the doctrine of primary jurisdiction.**

AT&T to the District Court 6/13/05 2005 Page 11 para 1:

The Inga Companies did not respond to the DC Circuit's January 2005 Opinion by asking the FCC to revisit the question of tariff

interpretation in light of the Courts of Appeal's rejection of the FCC's initial interpretation.¹

The Inga Companies did not act even though they solicited the advice of the FCC's General Counsel, who told the Inga Companies that they have the option to pursue further proceedings with the FCC to address any issues that were left open by the DC Circuit's Opinion²

Instead, Plaintiffs filed in this Court a series of Certifications from Mr. Inga and later this motion in this Court in an attempt to have this Court, not the FCC, decide the tariff interpretation issues that this Court and the Third Circuit have held to be matters for the FCC (and the DC Circuit).

AT&T also addresses petitioner's discrimination claims as AT&T allowed other aggregators to transfer traffic only without the S&T obligations transferring. AT&T tells the District Court that **other transfers that occurred in the past should be resolved by the FCC and DC Circuit.**

AT&T to the District Court of 6/13/05 Page 12 para 2:

In particular, before it made these precise claims in its motion to lift the stay, the Inga Companies had argued both before the FCC and the DC Circuit that [] (6) **that other transfers that occurred in the past also support the Inga Companies' positions.** Obviously, the Inga Companies made these claims to the FCC because they knew full well that these issues were encompassed within this Court's and the Third Circuit's primary jurisdiction referrals, and these epitomize the technical issues of tariff interpretation and communications policy that fall within the FCC's primary jurisdiction. That confirms that the issues cannot be adjudicated in this Court under its prior order and the Third Circuit's mandate.

Clearly AT&T is admitting that all the issues that petitioners raised regarding shortfall infliction and discrimination are before the FCC.

¹ The fact is petitioners counsel did ask the FCC if the DC Circuit Decision was in the FCC's viewpoint a remand or not, as the decision was not explicit on this, and the FCC stated it was not a remand; therefore petitioners went back to NJ.

² What the FCC general counsel stated was that petitioners could define any issues it wanted, whether or not it was an open issue before the DC Circuit.

10) Why didn't AT&T's February 20th 2007 comments address its comments that it made in 1996 and 2003 that the pre June 17th 1994 issue was "ripe" should be decided?

AT&T's 1996 Joint Petition for Declaratory Ruling Page 3 para 1

As to this issue, which does not require any findings as to disputed facts, the Commission should rule that shortfall charges may be imposed where, as here, post June -17th 1994 CSTPII replacement plans are discontinued or reach an anniversary date.

AT&T's 1996 Joint Petition for Declaratory Ruling Page 14 para 2

Petitioners have identified an issue which is currently ripe for a declaratory ruling; i.e., whether "pre-June 17th, 1994 CSTPII plans, as are involved here, may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary. "No factual questions surround this question"

AT&T's CORP. 2003 FURTHER REPLY COMMENTS TO FCC Page 3 para 1:

Accordingly, the Commission should deny the Joint Petition, and should instead issue the ruling requested by AT&T in its Comments filed in 1996 that shortfall charges may be imposed where, as here, post-June 17, 1994 CSTP II replacement plans are discontinued or reach an anniversary date.

Petitioners figured that AT&T would come up with a clever cover-up for its former position that the pre June 17th 1994 grandfathering issue was "ripe". Maybe like "What AT&T's counsels were actually referring to as being ripe were "de minimis"³ pre June 17th 1994 grandfathering provisions" not found in the tariff.

11) Lets also address AT&T's footnote:

³ AT&T attempted to cover up for AT&T counsel David Carpenters admission: "what obligations transfer depend upon what is transferred" by comically stating that what Mr. Carpenter what referring to were "de minimis" traffic only transfers as if such a tariffed provision existed.

FOOTNOTE 1: As AT&T explained in its Opening Comments, at 17 n.9, PSE still violated Section 2.1.8 because it refused to accept any of CCI's obligations, including those explicitly enumerated in section 2.1.8.

AT&T actually believes because it says something it becomes reality. AT&T provides nothing in the record where PSE states that it wants to assume zero obligations, including the only ones explicitly enumerated in section 2.1.8. AT&T initially did make its bogus statement in the DC Circuit Oral argument. Imagine, AT&T says it believed since the Jan.1995 traffic only transfer that PSE wanted to assume NO OBLIGATIONS, but AT&T just didn't get around to mentioning this until November 11th 2004! In the mean time AT&T told every court and the FCC that PSE did assume the two obligations enumerated within 2.1.8 in Jan 1995.

12) The FCC needs to review petitioners overwhelming evidence on page 89 para 221-page 99 para 247 under the heading:

XVII Despite the Court Decisions and AT&T's Prior Concessions that PSE Attempted to Assume the Proper Obligations AT&T Flat Out Lies that PSE Wanted to Assume Zero Obligations

Within that section it will evidence that AT&T conceded that PSE assumed the only obligations necessary and the only ones enumerated on the TSA in Jan 1995. It shows AT&T conceding to the Third Circuit that PSE assumed these account obligations. AT&T also conceded to the FCC in 2003 that PSE assumed the only two obligations needed on a traffic only transfer. The evidence is overwhelming against AT&T. There is no dispute between AT&T and petitioners that AT&T first raised its bogus defense about 10 years after section 2.1.8's statute of limitations period of 15 days.

13) AT&T's 2/20/07 brief on page 2 paragraph 1 asserts:

The entirely separate issue that petitioners and their supporters now improperly seek to raise involves the propriety of AT&T's imposition of shortfall charges on CCI's end-users in June 1996, 18 months after AT&T refused to process the proposed traffic transfer that is the subject of the referral.

Above AT&T stresses that the June 1996 shortfall infliction occurred 18 months after the Jan 1995 traffic only transfer. However AT&T based the propriety of denying the traffic only transfer on its ability to collect shortfall charges. The grandfather provision was in June of 1994 (6 months prior to the traffic only transfer) and it is not disputed that at the time of the traffic only transfer the plans were all immune from S&T obligations; therefore AT&T's reliance on fraudulent use claims were totally bogus. Therefore based upon AT&T's continuing to argue fraudulent use claims, the propriety of also addressing the non disputed pre June 17th 1994 grandfather issue, in and of itself, makes the grandfather issue one the FCC must rule on. The DC Circuit certainly was interested in knowing whether the plans were grandfathered.

14) Besides the propriety of addressing the grandfather issue as it relates to the traffic only transfer issue, the grandfather issue must be decided on its own merits as to the June 1996 shortfall infliction. Petitioners have already evidenced at page 20 para 48 in petitioner's 1/31/07 filing that the FCC had both parties separately brief the June 1996 shortfall infliction issue already and the 190 phone bills from June 1996 were added to the record. Additionally there are no disputed facts that the plans were still immune through 1995 and AT&T can not dispute that the FCC's Oct. 1995 Order (exhibit DD to petitioners 9/27/06 filing) further extended the grandfather through Oct 1996. AT&T also can not, and did not dispute that its

tariff on August 29th 1996 further extended shortfall immunity by providing a 100% shortfall credit. See page 5 of exhibit FF at (c) in petitioner's initial filing which states:

AT&T will provide a credit on shortfall if the customer does not meet **first year shortfall commitment.**

15) Additionally does not dispute that it illegally prohibited petitioners from enrolling AT&T LSTPII end-users into its plans on a restructured contract.

Petitioners Declaratory Ruling request shows how AT&T violated section 2.5.7 (Waiver of Shortfall Due to Circumstances Beyond the Customers Control).

See petitioners 9/27/06 filing on page 31 para 91

**XVI. AT&T's Position that CSTPII Plans Were "Not New"
So As to Prohibit LSTP Enrollments,
Also Confirms Restructures Are Not New Plans - The Section 2.5.7 Issue**

Also See

**II Shortfall Waived Under Section 2.5.7 Makes AT&T
An Automatic Loser of 1996 Shortfall Infliction-The Catch-22**

on page 14 of petitioners 1/31/07 filing. AT&T does not dispute that it violated 2.5.7 which would have all shortfall throughout 1994 and 1995. Due to the circumstances beyond petitioners control there would have been zero shortfall commitment the year before and the years after the traffic only transfer; 1994 through 1996)

16) Whether Judge Bassler intended to include the pre June 17th 1994 grandfather issue or not is irrelevant. The only thing that is relevant is that this is a requested declaratory ruling, that AT&T itself had asked to be decided, that has no disputed facts, and as AT&T itself stated was “ripe” for a FCC decision. The only issue to interpret is how many years, after June 17th 1994, can a three year plan be restructured under the old rules of to having to meet monthly pro-rata commitments. AT&T believes you can change the rules in the middle of the game. Judge Politan said it best in the District Court’s non vacated Decision which the FCC also quoted in its 2003 decision:

Plaintiffs cannot be held to construe the section governing transfers under the tariff as meaning that which it does not. Words mean what they say. **Rules should not be changed in the middle of the game; and certainly without notice.**

17) AT&T asserts on page 3:

The entirely separate issue that petitioners and their supporters now improperly seek to raise involves the propriety of AT&T's imposition of shortfall charges on CCI's end-users in June 1996, 18 months after AT&T refused to process the proposed traffic transfer that is the subject of the referral. **This "illegal remedy" issue does not implicate the scope of § 2.1.8 at all**, and it was manifestly not part of the original primary jurisdiction referral.

AT&T is correct that the shortfall application illegal remedy has nothing that “directly

Impacts”⁴ section 2.1.8; however AT&T raises zero disputed facts as to why the infliction in June 1996 was not an illegal remedy, and therefore this illegal remedy is ripe to be decided. As the FCC’s 2003 decision stated on Page 13 Footnote 87

Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary.

18) The FCC is correct. Therefore sending this issue back to the District Court or using CCI’s suggestion of having petitioner’s seek mandamus from the DC Circuit is not necessary, given the fact that AT&T acknowledges it violated its tariff at section 3.3.1.Q bullet 10. Additionally the FCC General Counsel confirmed that petitioners could define whatever declaratory Ruling it wished well before the Bassler referral.

Petitioners briefed its case in the District Court based upon the representations made by the FCC’s General Counsel, that petitioners could define its own Declaratory Rulings.

19) AT&T asserts on the bottom of page 3 into page 4:

⁴ Although AT&T’s shortfall application illegal remedy does not directly impact 2.1.8 it must be noted that the FCC’s position within the 2003 Decision that AT&T could not **speculate** that petitioners would not be able to meet its commitments is supported here.

AT&T’s apparent **speculation** that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question. FCC’s 2003 Decision.

The point the FCC made was that AT&T **could not speculate** because things like illegal remedies do happen. Due to the shortfall application illegal remedy AT&T would not have been able to rely upon the shortfall it bogusly **speculated** was a certainty; despite the plans being grandfathered. So in this way the shortfall application illegal remedy supports the FCC’s position on the 2.1.8 traffic only transfer.

“Their May 31, 2005 motion sought to re-institute proceedings before the Court, not the Commission; indeed, to avoid a referral, they focused solely on the 1995 transfer issue (which they claimed to have won) and represented that the June 1996 shortfall issue was "not directly at issue.”

The entire Exhibit A in petitioners 01/12/07 FCC filing involved June 17th 1994 shortfall issues.

See petitioners 01/12/07 FCC filing at page 17 of exhibit A

If Your Honor will not address the Illegal Remedy Complaints in Court, the Venue for Resolution of the Illegal Remedy is the Declaratory Ruling Process at the FCC.

20) Petitioners made it clear that if the Court would not adjudicate the shortfall issues the FCC was the venue for resolution of the illegal remedy.

AT&T erroneously states on page 5:

There is no mention in any of these subsequent submissions of AT&T's allegedly illegal imposition of shortfall charges on CCI end-users

AT&T simply overlooks the clear evidence. Petitioners in subsequent submissions again reminded Judge Bassler that AT&T used the shortfall application illegal remedy:

See petitioners 01/12/07 FCC filing at Exhibit B on page 8 June 30th 2005 clearly identifying the shortfall application illegal remedy:

In June of 1996, 18 months after AT&T's denial of the traffic transfer, AT&T initially placed millions of dollars of shortfall and termination penalties directly on plaintiffs' end-users even though the tariff required the penalties to initially be placed on plaintiffs' master compensation account. The infliction of these penalties by AT&T directly against the end-users owned by the plaintiff companies was an illegal remedy and this Court had previously found that the plans were immune from such penalties in any event.

Obviously AT&T is clearly skipping over all the evidence that shows otherwise as the above statement was just one of several petitioners made to Judge Bassler on the shortfall application illegal remedy after “AT&T’s imposed timeline” for when petitioners were suppose to argue the shortfall application illegal remedy. AT&T completely disregards petitioner’s extensive brief on the shortfall application illegal remedy (petitioner’s 1/12/07 FCC filing at exhibit A). **Judge Bassler did not tell the parties that he was not going to consider anything that had already been briefed. AT&T is dreaming!** Judge Bassler would have thought petitioners were crazy to resubmit the exact brief on the shortfall application illegal remedy. Therefore, petitioners subsequently made just a few references to this issue. It is amazing to witness the AT&T counsels as they keep creating nonsense on the fly in a futile attempt to deceive the FCC. **Listening to AT&T you would believe that petitioner’s detailed District Court filing of its June 1996 shortfall permissibility and infliction claims was parsed from the District Court Docket! Petitioners filing is still there!!!** AT&T can not defend itself any longer with anything substantive so it now relegates itself to totally nonsense defenses as when most of petitioner’s shortfall argument was argued to the District Court. Only because it is AT&T, have the Courts allowed AT&T’s nonsense to continue.

21) Petitioners not only argued before the District Court the June 17th 1994 issue and the shortfall application illegal remedy BUT it also argued many times that the plans should have had all S&T obligations waived under **section 2.5.7.** which waives all obligations “Due to Circumstances Beyond the Customers Control”. To follow is

just one of many statements petitioners made to Judge Bassler: See petitioners
1/12/07 FCC filing Exhibit E page 52

Additionally, these plans were immune from S&T liabilities due to the fact that tariff section “2.5.7”, was enacted which waives actual S&T obligations; Exhibit F.

22) AT&T's statements that petitioner's were solely arguing the traffic transfer issue is completely false as the evidence clearly shows. In any event AT&T's argument is irrelevant as AT&T does not show any evidence that there are disputed facts involving the pre June 17th 1994 issue, the shortfall application illegal remedy, the violation of section 2.5.7. and the discrimination issues.

23) Having received confirmation from the FCC's General Counsel that petitioner's could define whatever Declaratory Rulings it wished there was no need to further bombard Judge Bassler with extensive documentation on shortfall issues due to the fact that it already had submitted a substantial brief on this subject, (petitioners
1/12/07 FCC filing at exhibit A)

24) Petitioners had already proved the plans were grandfathered with Judge Politan, as the District Court Decisions (submitted on Jan 31st 2007) clearly show that Judge Politan understood the plans were immune from shortfall and termination obligations. The object before Judge Bassler was simply to lift the stay, and shortfall was argued. Shortfall infliction issues were already decided by Judge Politan after extensive briefing, discovery, and a 2 day hearing.

25) The entire reason AT&T did not get its \$15 million injunction bond was that Judge Politan understood the plans were immune from S&T obligations. As petitioners noted in its 1/31/07 comments on Page 18 paragraph 44:

The District Court Judge Politan 1996 Decision Joint Appendix pgs 169 -170:

Decision page 19 para 1

Commitments and shortfalls are little more than illusory concepts in the reseller industry—concepts which constantly undergo renegotiation and restructuring. The only “tangible” concern at this juncture is the service AT&T provides. The Court is satisfied that such services and their costs are protected. To the extent however that AT&T’s demand for fifteen million dollars’ security is premised on the danger of shortfalls, the Court finds that threat neither pivotal to the instant injunction nor properly substantiated by AT&T.

26) The major focus of the traffic transfer issue for Judge Politan was the pre June 17th 1994 grandfather provision. While petitioners focus before Judge Bassler was placed on the traffic only transfer issue, the evidence shows that petitioners certainly did not as AT&T asserts: “focused solely” on the 1995 transfer issue.

The only thing the FCC has to be concerned with here is the undisputed fact that there are no disputed facts regarding the pre June 17th 1994 issue, the shortfall application illegal remedy, section 2.5.7, and discrimination issues, thus all must be decided.

27) AT&T asserts on page 5 footnote 5

Employing characteristically tortured logic, petitioners "construe" counsel's statement that discrimination "is a fact question and you can litigate those fact questions," *see id.*, as a purported admission "that AT&T did thousands of these traffic only transfer without S&T obligations transferring." Ptrs' Reply Comments at 154. Obviously, in stating that this claim could be "*litigated*" AT&T's counsel was not conceding anything. Similarly, petitioners quote then-Judge Roberts' statement at oral argument that he thought the record showed that AT&T permitted transfers without all obligations transferring. *Id.* But petitioners omit the response by AT&T's counsel: "There w[ere] allegations made that we did that. *We disputed that.*" Exh. 5 attached hereto (emphasis added).

AT&T's defense above is that it said "*We disputed that.*" Herein lies AT&T's smoke blowing. Judge Roberts and Judge Bassler both examined the evidence and both Judges understood that AT&T routinely transferred traffic only and no shortfall or termination obligations were transferred. Petitioners submitted to the FCC in 2003 fellow aggregator Robert Collette's certification stating that he moved virtually all of his traffic to PSE and his CSTPII plans remained with its revenue and associated shortfall and termination obligations and PSE did not have to assume any S&T obligations. AT&T did not provide any evidence disputing that certification. AT&T instituted a \$50 fee when transferring just traffic only due to the incredible amount of traffic only that was being transferred to PSE and Tel-Save; the two entities that brought legal action against AT&T to get CT-516's discount of 66%. See \$50 fee tariff fee exhibited at S in petitioners 9/27/06 initial filing.) If all obligations were transferred there would be only one \$50 fee. Therefore why would any aggregator choose to pay for every account moved if it could pay only one \$50 fee if S&T obligations really did transfer on traffic only transfers. An aggregator would never choose to pay for every account transferred if under the tariff it meant in AT&T's

world that a traffic transfer mandated all obligations to transfer. AT&T's tariff interpretation of 2.1.8 does not jive with any of the other tariff provisions.

28) AT&T believes that because it simply says "We disputed that", that this statement is enough for the FCC not to rule on discrimination. AT&T provided zero evidence to the FCC; so when Mr. Carpenter stated "we disputed that", when exactly did AT&T dispute this, and what evidence did it provide when disputing it? It was simply AT&T making yet another gross misrepresentation to the Court. AT&T believes it does not have to show any evidence, or prove anything, as long as it says "it disputes".

Here is AT&T again with the same nonsense on page 6:

One reason petitioners' discrimination and "illegal shortfall remedy" issues are not properly before the Commission is because they involve factual disputes that cannot be resolved in a declaratory ruling proceeding.

AT&T again simply states one reason and says the issues involve factual disputes.

What are the factual disputes AT&T? Petitioners last week asked AT&T to point out what specific factual disputes there were regarding these issues? AT&T provides none! Of course it can not because the issue is so clear that there is nothing to dispute. AT&T initially put the shortfall charges on the end-users bills in June 1996. AT&T under its tariff must initially place the charges on the aggregator customer, and if the aggregator does not pay.....The tariff at 3.3.1.Q bullet 10 states that the shortfall can only reduce the discounts, not apply shortfall in amounts 20 times higher than the entire bill; so AT&T can rescue the end-users and bring them back to AT&T. The 190 bills that were in the record are the undisputed facts! (See a sample bill at exhibit NN of petitioners 9/27/06 initial

filing). This was not a mistake that AT&T did this. AT&T did this to petitioners in June of 1996 then did it again in March 1997. AT&T also did not refute that AT&T did the same shortfall application illegal remedy to 800 Services, Inc's end-users in November of 1995. This is a clear illegal remedy!

As the FCC stated:

Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary.
FCC's 2003 decision Page 13 Footnote 87

The FCC made it clear to the DC Circuit and the DC Circuit agreed that AT&T could not rely on illegal remedies: The FCC's June 2004 filing to the DC Court of Appeals:

In essence, the Commission ruled that AT&T had invoked a remedy other than the ones authorized under its tariff. But the terms of the tariff define and constrain AT&T's conduct and specify the remedies available to the company in connection with its provision of tariffed services. See AT&T v. Central Office Telephone Co., 524 U.S. at 222-24. As this Court recently noted, "filed tariffs are pointless if the carrier can depart from them at will. Orloff, 352 F.3d at 421. Condoning AT&T's departure in this case from the remedial terms of its tariff would "undermine the regulatory scheme" and give AT&T the power to control the economic fates of its customers here, the resellers. The Commission's holding on this issue thus is both consistent with the law and reasonable."

29) The only thing that the FCC can go on is the factual statements made by both Judges that AT&T routinely did (and still does today- see exhibit J to petitioners 9/27/06 filing) transfer traffic only with no plan obligations transferring. If plan obligations transferred on traffic only transfers then the transferee would have to complete a new AT&T network Services Commitments form for its new commitments. This never happened on traffic only transfers.

30) All AT&T would have to do is show that the transferee had to fill out a new Network Services Commitment form contract when participating in a traffic only transfer due to its increased commitments to AT&T. See Network Services Commitment form (exhibit EE to petitioners 9/27/06 initial filing) **AT&T can not show such evidence because no such evidence exists** despite the fact that AT&T claims it has done tens of thousands of traffic only transfers and continues to do them today.

31) AT&T asserts on page 6 para 1:

AT&T likewise disputes CCI's deeply flawed and mistaken assertion that it had already met its revenue commitments as of January 1995. See CCI's Further Comments Regarding Petitioners Request for Reconsideration. [FOOTNOTE]
[FOOTNOTE]

Among other things, CCI fails to recognize that minimum revenue commitments are measured on a plan-by-plan basis, not on a net basis across multiple plans.⁵

⁵ It must be noted that although AT&T states that each plan is measured on a plan-by-plan basis, not on a net basis across multiple plans: Why then did AT&T stop payment to CCI/Inga on all plans in June 1996 when only one plan allegedly went into shortfall? AT&T asserts the next plans did not go into shortfall until March 1997; however AT&T stopped payment on all the plans. When AT&T stopped payment to petitioners on all plans petitioners contacted a few of its end-users and advised them not to pay their phone bills to AT&T and instead pay petitioners 80% of what it was to pay AT&T just to have some money coming in. As per the tariff AT&T would debit the RVPP credits of the plan for 100% of what it was owed. A couple of the end-users called AT&T to confirm that under the tariff this is what would occur to make sure that its bills were paid. Despite the fact that AT&T was to receive 100% of its money, AT&T to make sure that petitioners would be totally choked off of funds to run its business, advised petitioners end-users that it would **disconnect the end-users service** if the end-users didn't continue to pay its bills directly to AT&T. Petitioners were advised by AT&T's staff that did collections on the end-users which were delinquent, that AT&T's legal department had instructed the AT&T collections department to advise all petitioners end-users that AT&T would disconnect its toll free service--- which was primarily used for sales and customer service---the very lifeline of a business! This was yet another illegal remedy as AT&T was being fully compensated for its charges, and there was no reason to threaten end-users who were not their end-users with **disconnection of their phone service**.

32) Again AT&T “disputes” without providing anything close to an actual disputed fact. CCI used AT&T’s own exhibit and showed that the plans fiscal year commitments were already met at the time of the traffic only transfer. The numbers don’t lie. In only 10 months the plans were already \$2 million over where they had to be in 12 months!

33) AT&T’s footnote stating that the minimum revenue commitments are measured on a plan-by-plan basis, not on a net basis across multiple plans misses the point. CCI’s analysis showed that at any time CCI could traffic only transfer accounts from the plans with excess volume to the plans that were under volume. Due to the fact that section 2.1.8 allows for traffic only transfers CCI at any time could have easily made for any plans revenue volume deficiency.

34) **Furthermore CCI/Inga could have at any time simply used section 2.1.8 to simultaneously merge plans that were under and over revenue commitment and a restructure them.** Guess what? That is exactly what CCI and Inga did. AT&T is well aware of the fact that after the combining of plans and restructuring there were only 5 plans left in March 1995, not the eight. The 5 CSTPII/RVPP plans that remained were: 2430, 2829, 3124, 3524, and 3663. All the plans that AT&T originally showed that were running below commitments were no longer running below commitment after the plans being all merged and restructured. The FCC must remember time reduces commitment no matter what usage was on the plan.

So whether the plans were over commitment or under commitments made no difference because there were grandfathered restructuring benefits remaining. At the time of the Jan 1995 traffic only transfer AT&T knew that its tariff allowed the merging and restructuring of plans together utilizing section 2.1.8. and therefore AT&T's statement that the plans were treated separately is missing the point that CCI correctly made in its comments⁶.

That is why AT&T's Carl Williams certification stressed the overall commitment remaining in his certification to the Court. The merging and restructuring of the plans was done months after the traffic only transfer and most importantly it was the first restructure after June 17th 1994 as AT&T can not dispute. Therefore even under AT&T's tariff interpretation, that the grandfather provision allows only a one time benefit on a 3 year plan commitment, AT&T clearly understood the plans were all immune from S&T obligations well into 1996 at the very minimum.

⁶ Section 2.1.8 as thoroughly detailed in the Inga Companies public comments in 2003 to the FCC was utilized for three different types of transfers.

A) Transfer the entire plan, where the commitment level of the transferee on the plan being assumed remains the same as it was in the hands of the transferor with no change in the remaining duration of the contract.

B) Traffic only- where the transferees' existing plan commitment remains the same and the transferee receives additional traffic. There is no change in the remaining duration of the contract

Or the commitment level on the plan that is accepting the traffic. **No AT&T Network Services Agreement contract changes are needed because there is no increase in transferee's commitment level or contract duration.**

C) A merging and simultaneous restructuring of two or more AT&T plans into one plan.—where the new plan must have a new term assumption starting date (TASD). The aggregator would indicate whether it wanted a new RVPP ID to take part in new promotions or utilize its existing RVPP ID to maintain grandfathered benefits of the one surviving plan RVPP ID.

The reason why there had to be notations on every AT&T 2.1.8 Transfer of Service Agreement (TSA) is that AT&T needed to know which of the three types of transfers the customer was ordering.

35) What the FCC really needs to understand here is: Given the undisputed fact that AT&T does not dispute, that as of the traffic only transfer date, all of the plans still had not been post June 17th 1994 restructured, makes the revenue commitment analysis **a totally moot argument!!!** 800 Services, Inc pointed out that AT&T's position is that the plans (4 of them according to the testimony of AT&T's Carl Williams") **would not have made its fiscal year commitment in 1995 if not for the ability to restructure prior to the fiscal year end true up date.**

36) Under AT&T's position then----- the fact that AT&T did not charge S&T penalties to these plans in 1995, that it states were under commitment, conclusively confirms the plans in AT&T's viewpoint had **not** been post June 17th 1994 restructured as of the Jan 1995 traffic only transfer; otherwise AT&T would have applied charges in 1995. AT&T does not dispute the fact that all the plans still had at the very minimum one restructure left (after the traffic only transfer) under the old pre June 17th 1994 rules of not needing to be meeting monthly pro-rata commitments at the time of the restructure. Therefore there is **no disputed fact** regarding whether or not the plans had already met its fiscal year commitments at the time of the traffic only transfer. **It is a moot issue** given the fact that the plans were all immune from shortfall and termination charges in any event.

37) AT&T asserts on page 7:

Nothing in the July 2005 email that is ostensibly from Commission Counsel Austin Schlick to petitioners' president, Mr, Alfonse Inga, alters that reality. Mr. Schlick's email **does not discuss the scope** of the referral or advise petitioners that the Commission could or would address issues relevant to claims pending in a District Court when the District Court has not referred those issues under the doctrine of

primary jurisdiction. Obviously, neither Mr. Schlick nor anyone else at the Commission has the authority to expand the scope of a district court's referral; such authority would lie exclusively with the district court or the courts sitting over it.

AT&T states that the FCC's General Counsel Mr. Schlick's July 2005 "email does not discuss the scope" of the June 2006 referral. Of course it does not because the Mr. Schlick's email was 11 months prior to Judge Bassler's June 2nd 2006 referral. The point that the FCC's General Counsel was making was that petitioner's would be permitted by the FCC "to define" whatever Declaratory Ruling petitioners wished. It did not matter what the scope of the future referral was to be.

38) Petitioners believe that Judge Bassler's June 2006 referral did intend to have all open issues addressed and AT&T believes the only open issue is the traffic only transfer. However whether or not Judge Bassler intended to have the other issues addressed is irrelevant, as petitioners have specifically requested issues which have no disputed facts to be adjudicated by the FCC. AT&T attempts to conflate the FCC's General Counsel's answer with the future referral the District Court Judge Bassler. There is no relationship to what the FCC's General Counsel stated to the referral. The message was clear as could be.

39) Judge Bassler did not respond to Petitioners 2004 attempt to have the shortfall issues separated from the traffic transfer issues and resolved by the District Court or to refer them to the FCC:

See entire Exhibit A in petitioners 01/12/07 FCC filing involved June 17th 1994 shortfall issues. At page 17 of exhibit A

If Your Honor will not address the Illegal Remedy Complaints in Court, the Venue for Resolution of the Illegal Remedy is the Declaratory Ruling Process at the FCC.

40) Petitioners wanted to make sure that if the stay was not lifted in NJ or if the future District Court referral did not encompass all the issues that petitioners wanted the FCC to resolve that it could go to the FCC to define whatever issues it wanted. FCC Counsel was simply stating that petitioners could define whatever issue it wished, irrespective of a future referral. AT&T does not dispute the fact that anyone can ask the FCC to issue a declaratory ruling and the rulings, as Mr. Schlick stated can be defined in any manner.

41) On another note AT&T is wrong when it states:

Obviously, neither Mr. Schlick nor anyone else at the Commission has the authority to expand the scope of a district court's referral; such authority would lie exclusively with the district court or the courts sitting over it.

The Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to “terminate a controversy or remove uncertainty [5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also* 47 U.S.C. §§ 154(i), (j); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C.Cir.), *cert denied*, 414 U.S. 914 (1973).] When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary to assist the referring court.

42) There obviously are controversies and uncertainties between AT&T and petitioners involving the pre June 17th 1994 grandfather issue, the shortfall

application illegal remedy, section 2.5.7 shortfall waiver, and discrimination issues that must be resolved. Therefore besides the fact that these Declaratory Rulings have specifically been requested by petitioners, the FCC absolutely does have the “broad discretion” to resolve these issues, even if the FCC believes that Judge Bassler’s “open issues” referral does not encompass the issues.

43) The adjudication of the shortfall grandfather issue is not only needed to establish liability in June 1996 it is needed by the District Court **to calculate damages on traffic transfer issue**: The District Court would need to know how long the petitioners could keep the traffic on other aggregator’s plans before having to bring it back to its CSTPII plans. The Court needs to know at what future point the petitioners would lose its CSTPII plans if it didn’t meet its revenue commitments. This issue not only affects petitioners but affects PSE. The Judge Politan District Court Decision shows that AT&T stated that PSE’s plans went into shortfall. Obviously if PSE had petitioners \$54 million in billing on its puny \$4.2 million per year commitment PSE would never have had a shortfall issue!!! In one month the revenue volume from petitioners would have satisfied the entire fiscal year volume of PSE. Therefore knowing how long petitioners could keep its traffic away from its CSTPII/RVPP plans has many consequences to petitioners and other parties.

Petitioners could have transferred its volume to several other aggregators but the District Court needs to know how long could this tariffed method been utilized.

44) AT&T has not provided zero disputed facts regarding the following:

A) Pre June 17th 1994 issue: Both parties agree that the plans hadn’t been restructured post June 17th 1994, and that the first plan at the minimum did not become a post June 17th 1994 plan until the June 1996 penalty infliction. AT&T did

not dispute that it was under the FCC's Oct 1995 Order to extend the grandfather provision through Oct 1996, and AT&T did not dispute the August 29th 1996 first year 100% shortfall credit. The FCC's job is simply to interpret the duration that the 3 year CSTPII/RVPP plans can restructure under the pre June 17th 1994 rules.

B) Section 2.5.7 issue: AT&T did not dispute at all and did not even mention Section 2.5.7 which would waive shortfall obligations in 1994, 1995, and 1996 due to Circumstances Beyond the Customers Control.

C) Shortfall Application Illegal Remedy: There are no disputed facts here either. AT&T acknowledges it billed the end-users for alleged shortfall charges in excess of the tariffed remedy of reducing the discounts.

D) Traffic Transfer Discrimination: AT&T produced zero evidence to counter the Judge Basslers, and Judge Roberts positions that AT&T routinely allowed its customers to transfer traffic only without transferring shortfall and termination obligations. All AT&T would have had to do is show one example of a traffic only transferee having to complete a new network services commitment form for the alleged plan obligations AT&T bogusly states transfer on traffic only transfers.

E) Access to Contract Tariff Discrimination: The FCC is most familiar with its rules and policy then in affect regarding customer's right to obtain a Contract tariff. There are no disputed facts here either. Petitioners evidenced Judge Politan's statements that petitioners were denied access to a contract tariff. AT&T did not

provide access to petitioners own CT or one that was available within the 90 day open public period. AT&T simply states it was under no requirement to give petitioners access to a deeper discounted plan even if petitioners obviously qualified for such plans.

F) 15 Day period Within Section 2.1.8: AT&T does not dispute that it did not notify petitioners within 15 days. AT&T simply states that the 15days should not be interpreted statute of limitations period. AT&T did not dispute that later versions of section 2.1.8 clarified that the 15 days was a statute of limitations period to raise any issues. The FCC needs to clarify whether this Declaratory Ruling will be adjudicated by the FCC.

G) Violation of 201(b) Issue: AT&T does not dispute that the plans could be restructured after the traffic only transfer date and therefore it was in violation of 201(b) for unjust and unreasonable use of its fraudulent use provisions, given the undisputed fact that the fiscal year commitments were not at issue due to being grandfathered at the time of the traffic only transfer.

Petitioners respectfully request the FCC to reconsider and clarify its Jan 12th 2007 Order. If the FCC will not adjudicate all the Declaratory Ruling Requests of petitioners the DC Circuit and/or the District Court will need further clarification as why the FCC will not rule on these issues.

Given the fact that all these issues have been extensively briefed and there are no disputed facts, is the FCC simply looking for additional specific orders stating to rule on these issues? Since there are no disputed facts evidenced by AT&T a hearing

in the NJ District Court on issues that the Court has already clearly understood in 1995 will just cause further delay and the issues are all coming right back to the FCC again anyway.

Respectfully submitted

/s/ Al Inga

Al Inga Pres

One Stop Financial, Inc
Group Discounts, Inc.
Winback & Conserve Program, Inc.
800 Discounts, Inc.